

TRANSFER PRICING : Failure on part of Assessing Officer to follow procedure under section 144C(1) is not a merely procedural or inadvertent error, but a breach of a mandatory provision. By not following procedure laid down in section 144C(1) to pass and furnish a draft Assessment Order to assessee and directly passing a final Assessment Order without giving assessee an opportunity to raise objections before DRP, there is a complete contravention of section 144C, Assessing Officer having wrongly assumed jurisdiction to straight away pass final order. This is not a mere irregularity but an incurable illegality. Even provisions of section 292B would not protect such an order as section 292B cannot be read to confer jurisdiction on Assessing Officer, where none exists

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[2021] 128 taxmann.com 426 (Bombay)

HIGH COURT OF BOMBAY

SHL (India) (P.) Ltd.

v.

Deputy Commissioner of Income-tax

SUNIL P. DESHMUKH AND ABHAY AHUJA, JJ.

WRIT PETITION (L) NO.11293 OF 2021

JULY 28, 2021

P.F. Kaka, Sr. Adv. **Divesh Chawla** and **Atul K. Jaani** *for the Petitioner.* **Sham Walve** *for the Respondent.*

JUDGMENT

Abhay Ahuja, J. - By this Petition filed under Article 226 of the Constitution of India, 1950, Petitioner is challenging the final Assessment Order dated 6th April, 2021 passed by National e-Assessment Centre, Delhi under section 143(3) read with Sections 143(3A) and 143(3B) of the Income-tax Act, 1961 (the "IT Act") and a Notice of Demand under section 156 of the IT Act, as also Penalty Notice under section 274 read with Section 270A of the IT Act for the Assessment Year 2017-2018.

2. Petitioner is an Indian Company, incorporated under the Companies Act, 1956. It is submitted that Petitioner is a part of SHL Group, United Kingdom and primarily a trading entity that provides SHL products (psychometric test), assessment, consultancy and training services ('SHL Solutions') to clients in India in various industries.

3. Petitioner had filed return of income on 30th March, 2018 declaring a total income of Rs. 1,01,31,750/-. Petitioner's case is that during the Assessment Year 2017-2018, Petitioner had entered into an international transaction with its Associated Enterprise (the "AE"), whereby it was granted a license to market, distribute and deliver the SHL Solutions to clients in India from its AE, for which Petitioner made payments towards Support Services Charges incurred by the AE. It is submitted that alongwith the return of income filed for the said year, in view of the various international transactions with the AEs, Form 3CEB was filed alongwith the return of income. Petitioner's case was selected under the Computer Assisted Scrutiny Scheme (CASS), pursuant to which, on 5th September, 2018 a notice was issued under section 143(2) of the IT Act. Thereafter, on 6th August, 2019, a reference was made to the Transfer Pricing Officer (TPO) by the first Respondent. Thereafter, a Notice was issued on 16th

August, 2019 by the TPO and an order dated 29th January, 2021 was passed by the TPO proposing transfer pricing adjustments of Rs. 10,74,54,337/- considered as Nil by Petitioner. On 10th March, 2021, the second Respondent, viz., National e-Assessment Centre, Delhi requested Petitioner to provide rebuttal to the proposed adjustments to the arm's length price made by TPO. On 15th March, 2021, Petitioner filed a reply and on 6th April, 2021, a final Assessment Order was passed under section 143 (3) read with Sections 143(3A) and 143(3B) of the IT Act determining total income at Rs. 11,75,86,087/-. A Notice of Demand for Rs. 1,17,60,810/- was also issued. Notice initiating penalty proceedings also came to be issued under section 274 read with Section 270A of the IT Act.

4. Mr. Kaka, Learned Senior Counsel submits on behalf of Petitioner that before passing final Assessment Order, in case of transfer pricing adjustment, as in the case of Petitioner, there is a totally different procedure to be followed pursuant to Section 144C(1) of the IT Act. He submits that in pursuance of Section 144C(1) read with Section 143(3) of the IT Act, the Assessing Officer is necessarily required to forward a draft Assessment Order, in the first instance to the assessee, if he proposes to make any variation in the income or loss returned, which is prejudicial to the interest of such eligible assessee as defined under section 144(15) (b) of the IT Act.

5. Learned Senior Counsel submits that on receipt of the draft Assessment Order as per Section 144C(1) of the IT Act, Petitioner is entitled to file its objections before the Dispute Resolution Panel (DRP) and the Assessing Officer, as per Section 144C(2) of the IT Act, or it may file its acceptance to such variation by the Assessing Officer. It is submitted that Respondent No. 2 is to complete the assessment and pass the final Assessment Order only after directions are issued by the DRP under section 144C(5) of the IT Act and only thereafter Respondent could have passed the final Assessment Order.

6. He further submits that on receipt of the objections under section 144C(2) of the IT Act, DRP shall issue directions under section 144C(5) of the IT Act to the Assessing Officer providing guidance to enable completion of the assessment, which directions are binding upon the assessee under section 144C(10) of the IT Act. He submits that the Assessing Officer has to pass the final Assessment Order under section 143(3) read with Section 144(13) of the IT Act, in conformity with the directions issued by the DRP and that Respondent No. 2 is not authorised to pass any final order without the directions of the DRP.

7. It is submitted on behalf of Petitioner that in view of the provisions of Section 144C(1) of the IT Act, Respondent No. 2 is firstly required to pass a draft Assessment Order and not directly pass a final Assessment Order.

8. Learned Senior Counsel submits that these provisions are mandatory and not merely directory. He submits that an order passed contrary to the provisions of Section 144C of the IT Act and a failure to follow the binding procedure laid down therein would render the order without jurisdiction and thereby void *ab initio* and ought to be quashed.

9 He also submits that action on the part of the Assessing Officer, in not following the mandatory procedure laid down by the IT Act, is a jurisdictional and fundamental error going to the root of his order and is not a curable defect under section 292B of the IT Act.

10. Mr. Kaka, Learned Senior Counsel further submits that various courts across the country have upheld the aforesaid propositions. He relies upon the following decisions :-

- (i) *M/s. Zuari Cement Limited v. The Assistant Commissioner of Income Tax, Circle-2(1), Tirupathi (Andhra Pradesh High Court) in Writ Petition No. 5557 of 2012, decided on 21/02/2013.*
- (ii) *Commissioner of Income Tax, Vadodara-2 v. C-Sam (India)(P.) Limited;*

[2017] 84 taxmann.com 261 (Gujarat).

(iii) *International Air Transport Association v. Deputy Commissioner of Income-tax & Ors.* (Bombay High Court) in Writ Petition (L) No. 351 of 2016, decided on 18/02/2016 .

(iv) *JCB India Limited v. Deputy Commissioner of Income-tax*; [2017]85 taxmann.com 155 (Delhi).

11. Mr. Kaka further submits that the Assessment Order dated 6th April, 2021 for the Assessment Year 2017-2018, being after 31st March, 2021, is time barred and the subsequent extensions would not come in the way of such statutory time barring.

12. He submits that, therefore, the order passed by the Respondent is contrary to law, erroneous, arbitrary, without jurisdiction and void *ab initio* and ought to be quashed.

13. On the other hand, the Revenue has filed its affidavit in reply dated 3rd July, 2021. Mr. Sham Walve, Learned Standing Counsel for the Revenue makes submissions in terms of Paragraphs 24 and 26 of the said reply, which are quoted as under :-

"24. With reference to para 24 of the petition, I say that, procedures to be adopted for passing assessment order is discussed. It is correct that procedural lapses have been committed at the end of assessing Officer. It was an inadvertent mistake due to procedural lapses committed on the part of AO as he was in tremendous pressure of work load of two charges. The time limit for completion of the cases was forthcoming with huge complex cases were pending. Due to COVID pandemic, disruption in discharge of duty is yet another reason of lapses occurred. Many of the officials or their family was affected thereby making the workload a huge burden in this new form of faceless assessment. Order has been passed inadvertently u/s 143(3) rws 143 (3A) or 143(3B) of the Act in place of section 143(3) rws 144C of the Act. But, sufficient opportunity was given to the assessee company for rebuttal of the proposed addition of Rs. 10,74,54,337/- as suggested by the TPO *vide* his order passed u/s 92CA(3) dated 29/01/2021, through a show-cause notice, dated 10/03/2021. Assessee's submission was perused and considered. Submission of the assessee was found not acceptable. Accordingly, order was passed as discussed above and delivered to the assessee along with notice of demand u/s 156 and penalty notice u/s 274 rws 270A of the act. In nutshell, order cannot be said an invalid one because the sum and substance of the order regarding addition is in a strong footing and cannot be challenged. The procedural lapse is a rectifiable mistake without altering the crux of the case.

26. With reference to para 26 of the petition, I say that, assessee preferred to file writ petition as it found no way to move before DRP in its case. It is submitted here remedial action may be directed by the Hon'ble High court in the light of judgement given by the Apex court on 19/11/2010 in the case of *ITO v. M Pirai Choodi* 334 ITR 262 SC. In this case observations of the Supreme Court in this regard are as follows: "..... We are of the view that the High Court should not have *set aside* the entire assessment order. At the highest, the High Court should have directed the Assessing Officer to grant an opportunity to the assessee to cross-examine the concerned witness. Be that as it may, we are of the view that, even on this particular aspect, the assessee could have gone in appeal to the Commissioner of Income-tax (Appeals). The assessee has failed to avail of the statutory remedy. In the circumstances, we are of the view that the High Court should not have quashed the assessment proceedings *vide* the impugned order." in case of technical mistake the order can be *set aside* and not quashed."

14. Referring to the extensions of the timelines for passing Assessment Order to 30th April, to 30th June and now to 30th September, 2021 he submits that to say that an Assessment Order passed after 31st

March is time barred is fallacious as the same is made under section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 .

15. Mr. Kaka, in rejoinder, reiterates his submissions made earlier and refers to the extensions of timelines to rejoin that for the Revenue to say that the procedural lapse was committed on the part of the Assessing Officer, as he was under tremendous pressure of workload of two charges, is incorrect as the time was already extended and there would be no question of work pressure in such circumstances.

16. Learned Senior Counsel submits that, therefore, it cannot be said that the error committed by the Assessing Officer is merely a procedural error and not a jurisdictional error. He submits that this is an error, which cannot be rectified under section 292B of the IT Act. There is no restoration that can be made in this case. He submits that this is also not a case, which can be considered to be a case, where the principles of natural justice have been breached and, therefore, no purpose can be served by remanding a matter back for a fresh consideration, as this is a case of jurisdictional error and not a mere procedural one. In this view of the matter, he submits that the impugned final order ought to be quashed and *set aside* and the proceedings be treated as void *ab initio*.

17. We have heard Mr. Porus Kaka, Learned Senior Counsel, on behalf of Petitioner and Mr. Sham Walve, Learned Standing Counsel for Respondents and with their able assistance, we have perused the papers and proceedings in the matter.

18. Facts not being in dispute, the questions that arise for our consideration are (i) whether the provisions contained in Section 144C(1) of the IT Act are mandatory or directory and (ii) whether there has been a mere procedural error on the part of the Assessing Officer in passing the final Assessment Order without passing a draft Assessment Order, as required under section 144C(1) of the IT Act or has there been a jurisdictional error, which strikes to the root of the entire proceedings.

19. Before proceeding further, it would be useful to set forth Section 144C of the IT Act as under :-

Reference to dispute resolution panel.

144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—

- (a) file his acceptance of the variations to the Assessing Officer; or
- (b) file his objections, if any, to such variation with,—
 - (i) the Dispute Resolution Panel; and
 - (ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if—

- (a) the assessee intimates to the Assessing Officer the acceptance of the variation; or
- (b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 or section 153B, pass the assessment order under sub-section (3) within one month from the end of the month in which,—

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it; and

(g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not *set aside* any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is

received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Principal Commissioner or Commissioner as provided in sub-section (12) of section 144BA.

(14B) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of issuance of directions by the dispute resolution panel, so as to impart greater efficiency, transparency and accountability by—

- (a) eliminating the interface between the dispute resolution panel and the eligible assessee or any other person to the extent technologically feasible;
- (b) optimising utilisation of the resources through economies of scale and functional specialisation;
- (c) introducing a mechanism with dynamic jurisdiction for issuance of directions by dispute resolution panel.

(14C) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (14B), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:

Provided that no direction shall be issued after the 31st day of March, 2022.

(14D) Every notification issued under sub-section (14B) and sub-section (14C) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.

(15) For the purposes of this section,—

- (a) "Dispute Resolution Panel" means a collegium comprising of three Principal Commissioners or Commissioners of Income-tax constituted by the Board for this purpose;
- (b) "eligible assessee" means,—
 - (i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and
 - (ii) any non-resident not being a company, or any foreign company.

20. Whether the provisions of Section 144C(1) of the IT Act are mandatory in nature came to be considered by the Andhra Pradesh High Court in the case of *M/s. Zuari Cement Limited v. The Assistant Commissioner of Income Tax, Circle-2(1), Tirupathi* (Andhra Pradesh High Court) (*supra*). This was a case where the Transfer Pricing Officer had passed an order under section 92CA(3) of the IT Act recommending a Transfer Pricing Adjustment, which was forwarded to the Petitioner. The Respondent -Assessing Officer, after receiving the order of the TPO and after examining the information furnished by the Petitioner therein, passed the Assessment Order dated 23rd December, 2011 under section 143(3) of the IT Act raising a demand of Rs. 27,40,71,913/- and a demand notice for the said amount was issued under section 156 of the IT Act. The Petitioner submitted a letter dated 20th January, 2012 raising objections to the said assessment order contending that the provisions of Section 144C of the IT Act

were not followed before passing the order. The Andhra Pradesh High Court, after considering the provisions of Section 144C(1) of the IT Act, held that provisions of Section 144C are mandatory as the Assessing Officer under section 144C(1) is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objections and then complete assessment. The following paragraphs from Pages 7, 8 and 9 of the said decision are relevant and are quoted as under :-

"A reading of the above section shows that if the Assessing Officer proposes to make, on or after 1-10-2009, any variation in the income or loss returned by an assessee, then, notwithstanding anything to the contrary contained in the Act, he shall first pass a draft assessment order, forward it to the assessee and after the assessee files his objections, if any, the Assessing Officer shall complete assessment within one month. The assessee is also given an option to file objections before the Dispute Resolution Panel in which event the latter can issue directions for the guidance of the Assessing Officer to enable him to complete the assessment.

In the case of the petitioner, admittedly the TPO suggested an adjustment of Rs. 52.14 crores u/s.92CA of the Act on 20-9-2011 and forwarded it to the Assessing Officer and to the assessee under sub-section (3) thereof. The Assessing Officer accepted the variation submitted by the TPO without giving the petitioner any opportunity to object to it and passed the impugned assessment order. As this has occurred after 1-10-2009, the cut off date prescribed in sub-section (1) of S.144C, the Assessing Officer is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objections and then complete assessment. Admittedly this has not been done and the respondent has passed a final assessment order dt.23-12-2011 straight away. Therefore, the impugned order of assessment is clearly contrary to S.144C of the Act and is without jurisdiction, null and void.

In this view of the matter, we are of the view that the impugned order of assessment dt.23-12-2011 passed by the respondent is contrary to the mandatory provisions of S.144C of the Act and is passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable. Consequently, the demand notice dated 23-12-2011 issued by the respondent is set aside."

21. It is also submitted that the Special Leave Petition filed by the Revenue against this decision has been dismissed by the Hon'ble Supreme Court. It is, therefore, evident that the provisions of Section 144C(1) are mandatory and not directory.

22. The question whether failure to give an opportunity of filing objections to Petitioner under section 144C (2) would be a mere procedural error or a jurisdictional error came to be considered by the Gujarat High Court in case of *Commissioner of Income Tax, Vadodara-2 v. C-Sam (India) (P.) Limited (supra)* wherein while deciding the question of law in an appeal, it was held that the procedure laid down under section 144C of the Act is not merely procedural as the provision to first pass a draft order and provide a copy thereof to the assessee is a mandatory requirement and gives substantive rights to the assessee to object to any additions before they are made and such objections have to be considered not by the Assessing Officer but by the DRP. Once DRP gives direction under section 144C(5) of the IT Act, Assessing Officer has to pass the Assessment Order in terms of such directions without giving any further hearing to the assessee, which means the same would also bind the assessee, subject to, of course, to the challenge to the order of the Assessing Officer before the Tribunal. Nevertheless, at the stage of assessment, there is no remedy against the directions issued by the DRP under sub-section (5). Where there is an upward revision to the income on the basis of the transfer pricing mechanism, opportunity of raising objections before DRP cannot be taken away by treating it as merely procedural in nature. Paragraphs 6 and 7 of the said decision are quoted as under :-

"6. These statutory provisions make it abundantly clear that the procedure laid down under section

144C of the Act is of great importance and is mandatory. Before the Assessing Officer can make variations in the returned income of an eligible assessee, as noted, sub-section (1) of Section 144C lays down the procedure to be followed notwithstanding anything to the contrary contained in the Act. This *non-obstante* clause thus gives an overriding effect to the procedure 'notwithstanding anything to the contrary contained in the Act'. Sub-section (5) of Section 144C empowers the DRP to issue directions to the Assessing Officer to enable him to complete the assessment. Sub-section (10) of Section 144C makes such directions binding on the Assessing Officer. As per sub-section (13) of Section 144C, the Assessing Officer is required to pass the order of assessment in terms of such directions without any further hearing being granted to the assessee.

7. The procedure laid down under section 144C of the Act is thus of great importance. When an Assessing Officer proposes to make variations to the returned income declared by an eligible assessee he has to first pass a draft order, provide a copy thereof to the assessee and only thereupon the assessee could exercise his valuable right to raise objections before the DRP on any of the proposed variations. In addition to giving such opportunity to an assessee, decision of the DRP is made binding on the Assessing Officer. It is therefore not possible to uphold the Revenue's contention that such requirement is merely procedural. The requirement is mandatory and gives substantive rights to the assessee to object to any additions before they are made and such objections have to be considered not by the Assessing Officer but by the DRP. Interestingly, once the DRP gives directions under sub-section (5) of Section 144C, the Assessing Officer is expected to pass the order of assessment in terms of such directions without giving any further hearing to the assessee. Thus, at the level of the Assessing Officer, the directions of the DRP under sub-section (5) of Section 144C would bind even the assessee. He may of course challenge the order of the Assessing Officer before the Tribunal and take up all contentions. Nevertheless at the stage of assessment, he has no remedy against the directions issued by the DRP under sub-section (5). All these provisions amply demonstrate that the legislature desired to give an important opportunity to an assessee who is likely to be subjected to upward revision of income on the basis of transfer pricing mechanism. Such opportunity cannot be taken away by treating it as purely procedural in nature."

23. This Court, in the case of *International Air Transport Association v. Deputy Commissioner of Income-tax & Ors. (supra)*, while considering a similar situation held as under :-

"5. However, it is pertinent to note that the order dated 7th October, 2015 of the DRP in paragraph (3) thereof records that "There is no dispute that the assessee is a foreign company". This position is undisputed even before us. Therefore, in view of Section 144C(15) of the Act which defines eligible assessee to whom Section 144C(1) of the Act applies to *inter alia* mean any foreign company. Therefore, a draft assessment order under section 144C(1) of the Act is mandated before the Assessing Officer passes a final order under section 143(3) of the Act in case of eligible assessee. An draft assessment order passed under section 144C(1) of the Act bestows certain rights upon an eligible assessee such as to approach the DRP with its objections to such a draft assessment order. This is for the reason that an eligible assessee's grievance can be addressed before a final assessment order is passed and appellate proceedings invoked by it. However, these special rights made available to eligible assessee under section 144C of the Act are rendered futile, if directly a final order under section 143(3) of the Act is passed without being preceded by draft assessment order.

6. In the above view, the assessment order dated 23rd March, 2015 passed by the Assessing Officer for the assessment year 2012-13 is completely without jurisdiction. This is so as it has not been preceded by a draft assessment order. Hence, the foundational/basic order *viz.* the assessment order dated 23rd March, 2015 is *set aside* and quashed as being without jurisdiction. Consequent orders

passed on rectification application as well as on penalty are also quashed and *set aside* being unsustainable.

7. The view we have taken in the present facts also finds support from the unreported decision of the Andhra Pradesh High Court in *M/s. Zuari Cement Limited v.. ACIT* (Writ Petition No. 5557 of 2012) rendered on 21st February, 2013 from which an SLP preferred by the Revenue has also been dismissed by the Apex Court by an order dated 27th September, 2013.

8. Thus, we *set aside* the assessment order dated 23rd March, 2015, the order dated 30th April, 2015 on the Petitioner's rectification application and the order dated 29th September, 2015 imposing penalty upon the Petitioner. However, it is made clear that the parties are free to take such action and/or defenses as are available to them in law. All contentions of both the parties are kept open.

9. Petition disposed of as above. No order as to costs."

24. The decision of the Delhi High Court in the case of *JCB India Limited v. Deputy Commissioner of Income-tax (supra)* also re-emphasizes that the assessing Officer cannot straight away pass a final assessment order without issuing a draft assessment order under section 144C(1), even in the case of remand of proceedings and that such an omission is not a mere irregularity, but an incurable illegality, which cannot be saved by Section 292B of the IT Act. Paragraphs 17, 18, 19 and 20 of the said decision are relevant and the same are quoted as under :-

"17. The Court is unable to agree with the submissions made on behalf of the Revenue by Mr. Jain. Section 144C (1) of the Act is unambiguous. It requires the AO to pass a draft assessment order after receipt of the report from the TPO. There is nothing in the wording of Section 144C (1) which would indicate that this requirement of passing a draft assessment order does not arise where the exercise had been undertaken by the TPO on remand to it, of the said issue, by the ITAT.

18. It was then contended by Mr. Jain that the assessment order passed by the AO should not be declared to be invalid because of the failure to first pass a draft assessment order under section 144C of the Act. In this regard, reference is made to Section 292B of the Act.

19. As already noted, the final assessment order of the AO stood vitiated not on account of mere irregularity but since it was an incurable illegality. Section 292B of the Act would not protect such an order. This has been explained by this Court in its decision *Pr. CIT v. Citi Financial Consumer Finance India (P.) Ltd.* [IT Appeal No. 275 (Delhi) of 2015, dated 17-7-2015] where it was held:

"Section 292B of the Act cannot be read to confer jurisdiction on the AO where none exists. The said Section only protects return of income, assessment, notice, summons or other proceedings from any mistake in such return of income, assessment notices, summons or other proceedings, provided the same are in substance and in effect in conformity with the intent of purposes of the Act."

20. The Court further observed that Section 292B of the Act cannot save an order not passed in accordance with the provisions of the Act. As the Court explained, "the issue involved is not about a mistake in the said order but the power of the AO to pass the order."

It is pertinent to note that this decision also refers to the Gujarat High Court decision in the case of *Commissioner of Income Tax, Vadodara-2 v. C-Sam (India) (P.) Limited (supra)* and in particular to Paragraphs 6 and 7 as referred to by us earlier.

25. In our view, the following principles emerge from the above discussion :-

(i) that the procedure prescribed under section 144C of the IT Act is a

mandatory procedure and not directory.

- (ii) failure to follow the procedure under Section 144C(1) would be a jurisdictional error and not merely procedural error or irregularity.
- (iii) therefore, Section 292B of the IT Act cannot save an order passed in breach of the provisions of Section 144C(1), the same being an incurable illegality.

26. It is important to note that Section 144C(1) is a non-obstante provision, which requires its compliance irrespective of the other provisions that may be contained in the IT Act. There is no dispute that Petitioner is an eligible assessee and also there is no dispute as to the applicability of Section 144C. It is also not in dispute that the final Assessment Order has been passed without the draft Assessment Order as contemplated under section 144C (1) of the IT Act. The Assessing Officer ought to have in the first instance forwarded a draft of the proposed order of assessment to Petitioner, as there was a proposed variation prejudicial to the interest of the assessee. This important step has been completely omitted by the Respondent taking away a very necessary right of Petitioner to file objections to the proposed variation with the DRP and the Assessing Officer, which in our view, strikes to the root of the procedure contemplated by Section 144C.

27. Applying the aforesaid principles to the facts of this case, we are of the view that the failure on the part of the Assessing Officer to follow the procedure under section 144C(1) is not a merely procedural or inadvertent error, but a breach of a mandatory provision. We are also not impressed with the arguments of the Revenue that the Assessing Officer was under pressure of two charges, as there were timelines to adhere to, since the said timelines from time to time have been extended, the most recent one being to 30th September, 2021. The Revenue ought to have appreciated that the requirement under section 144C(1) to first pass a draft Assessment Order and to provide a copy thereof to the assessee is a mandatory requirement which gave substantive right to the assessee to object to any variation, that is prejudicial to it. In this case, the order under section 92CA (3) of the IT Act, proposed to make an adjustment of Rs. 107,454,337/- to the arm's length price considered as Nil by Petitioner and to that extent the said adjustment was evidently prejudicial to the interest of Petitioner. Depriving Petitioner of this valuable right to raise objection before DRP would be denial of substantive rights to the assessee, for which, in our view, the Assessing Officer has no power under the statute, as the provision clearly mandates the Assessing Officer to pass and furnish a draft Assessment Order in the first instance in such a case. The legislature, in our view, has intended to give an important opportunity to Petitioner, who is an eligible assessee, which in our view, has been taken away. In our view, failure to follow the procedure under section 144C(1) would be a jurisdictional error and not merely procedural error or a mere irregularity. The Assessment Order has not been passed in accordance with the provisions of Section 144C of the IT Act. This is not an issue, which involves a mistake in the said order, but it involves the power of the Assessing Officer to pass the order. By not following the procedure laid down in Section 144C(1) to pass and furnish a draft Assessment Order to Petitioner and directly passing a final Assessment Order and without giving Petitioner an opportunity to raise objections before the DRP, there is a complete contravention of Section 144C, the Assessing Officer having wrongly assumed jurisdiction to straight away pass the final order. This is not a mere irregularity but an incurable illegality. Even the provisions of Section 292B of the IT Act would not protect such an order as Section 292B of the IT Act cannot be read to confer jurisdiction on the Assessing Officer, where none exists. The Supreme Court decision in the case of *Income-Tax Officer v. M. Pirai Choodi*; [2011] 334 ITR 262 (SC) referred to in the Revenue's reply is also not applicable to the issue at hand as that was a case where the assessee was not given an opportunity to cross-examine the concerned witness and which assessee also had a statutory appellate remedy which the assessee had failed to avail of, whereas there is no such right available to Petitioner in this case. In fact, Petitioner has lost a substantive right due to the failure of the Respondents to pass and forward a draft assessment order in the first instance on a variance, prejudicial to the interest of Petitioner. In our view, this is clearly a case of jurisdictional error. The final assessment order passed

by the Assessing Officer stands vitiated on account of lack of jurisdiction, which is incurable and deserves to be *set aside* as void *ab initio*.

28. We, therefore, quash and *set aside* the impugned Assessment Order, Demand Notice and Penalty Notice, all dated 6th April, 2021 for the Assessment Year 2017-2018.

29. Writ Petition is allowed in the above terms. However, there shall be no order as to costs.

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